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No. 99-901

IN THE

Supreme Court of the United States

BRENTWOOD ACADEMY,

Petitioner,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION and RONNIE CARTER, Executive Director and Individually,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE TENNESSEE LAWYERS' ASSOCIATION FOR WOMEN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Tennessee Lawyers' Association for Women (hereinafter, sometimes, "TLAW") is a nonprofit professional organization whose purposes include seeking equal protection of the law and promoting equality of opportunity for women. Its interest in this appeal is threefold.[1]

First, this case is relevant to TLAW because, if the Tennessee Secondary Schools Athletic Association (hereinafter, "TSSAA") is not held to be a state actor, and if its actions in governing high school athletics in Tennessee are not held to constitute state action, then women will be foreclosed from challenging the TSSAA's actions and decisions, or actions taken pursuant to its governance, on constitutional grounds, such as denial of equal protection or due process of law. For example, the TSSAA and its member schools will be free to deny female athletes fair access to athletic programs and facilities. Indeed, the TSSAA has done so in the past. If such actions or decisions occur, it cannot be certain that there would be a statutory remedy. The right to challenge the actions of the TSSAA and its member schools on constitutional grounds must be preserved.

Second, the interests of the *schools* that are members of the TSSAA are represented in this Court. In addition, the interests of the *students* who participate in high school athletics need to be underscored. While TLAW is not an official representative of those students and their families, it is appropriate for several points to be made on their behalf in order for this Court to gain perspective.

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1. This *amicus curiae* Brief is being filed with the consent of all parties pursuant to Rule 37.3(a) of the Rules of the Supreme Court of the United States. The parties' consents are being lodged separately with the Court. As required by Rule 37.6 of the Rules of the Supreme Court of the United States, *amicus curiae* TLAW states that counsel for a party did not author the accompanying brief in whole or in part, and further states that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this Brief.

Third, TLAW believes that participation in athletics is a beneficial way for young women to excel. Through athletics, they gain and strengthen many qualities which would serve them well if they should later enter the legal profession as lawyers, paraprofessionals, or nonprofessionals. These qualities include, among many others, leadership, perseverance, the ability to cooperate with others, organizational and time management skills, and a sense of fair play. The legal profession benefits from counting among its numbers both professional and nonprofessional women who have participated in athletics during their youth.

TLAW does not take a position upon the substantive merits of this case, *i.e.*, the constitutionality or validity of the so-called Recruiting Rule imposed upon independent schools by the TSSAA. Further, it does not take a position upon the relative benefits or advantages of public versus private schools. It wishes only to address the issue of whether the TSSAA is a state actor and whether its governance of high school athletics is state action.

SUMMARY OF THE ARGUMENT

This case is not the first time a court has addressed whether or not the TSSAA is a state actor. Every previous case has either been based upon the premise that the TSSAA is a state actor, or has affirmatively ruled that it is a state actor. There is no indication that the detailed facts recited by the District Court in its opinion in *Brentwood Academy v. TSSAA*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998) have in any way changed over the years, except for the amendment of a rule adopted by the Tennessee Board of Education in 1995.

Education in Tennessee is guaranteed by the Tennessee Constitution. Title 49 of the Tennessee Code creates the Tennessee Department of Education and expressly contemplates that the Department has jurisdiction over private schools. The State Board of Education has adopted rules that implement its

powers to govern all aspects of education, including the accreditation of private schools by setting detailed standards.

The rules of the Board of Education also assert governance over secondary school interscholastic sports. This is accomplished through the TSSAA, with which the Board of Education has had a relationship for decades. In 1972, the Board enacted a rule designating the TSSAA to be the body to govern secondary school interscholastic sports. In 1995, the Board amended the rule to recognize the TSSAA as the body that governs secondary school sports, and to authorize schools to continue to belong to the TSSAA.

The District Court ruled in this case that under the facts and the law, the TSSAA is a state actor. The Sixth Circuit Court of Appeals reversed, holding that the TSSAA is not a state actor. The Sixth Circuit is in error and this Court should reverse its ruling because the only change of circumstances in this case is the amendment of the Board of Education's rule (which was amended as a shield against litigation), and because the facts of this case are closely parallel to the facts in cases in which other states' secondary school athletic associations have properly been held to be state actors.

The existence of state action must be determined based upon the facts as they actually exist, and not upon mere semantics or nomenclature.

TLAW asserts that all tests for finding state action have been met, including the "membership/control" and the "joint participation" tests. This result is fully supported by *NCAA v. Tarkanian*, 488 U.S. 179 (1988). The Sixth Circuit misconstrued Footnote 13 in that case, *id.* at 193 n.13.

TLAW also respectfully asserts that the Court should consider the "public function" test, as well, even though that test is not pressed by the Petitioner, Brentwood Academy. The public function involved in this case is education, not high school sports. This Court is requested to rule that education is a public

function under *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) and *Tennessee Small Sch. Systems v. McWherter*, 851 S.W.2d 139 (Tenn. 1993).

TLAW believes that the position of Petitioner, Brentwood Academy, is supported by the case of *United States v. Virginia*, 518 U.W. 515 (1996), ruling that Virginia must afford to women students the same opportunity to attend a school of high caliber, operated under the "adversative system," that it affords to male students who attend the Virginia Military Institute.

High school sports are an integral and important facet of education. The Board of Education and the TSSAA have admitted this in their own statements. In light of this fact, this Court should consider the effect that its ruling will have upon students.

The schools, public and private, which are members of the TSSAA exist for the benefit of the students and the community. A school cannot be isolated from its students. It is the lives, educations and futures of the students that will be detrimentally affected if the TSSAA is held *not* to be a state actor. If the TSSAA is allowed to avoid state actor status based upon the wording of a rule that was adopted precisely to serve as a shield from litigation, it must be anticipated that all other states will take the same steps. The consequence of this will be that state athletic associations will be able to deny female students their constitutional rights, possibly without any statutory redress.

Consequently, TLAW requests that the ruling of the Sixth Circuit be reversed, that this Court rule that education is a public function, and that the judgment of the District Court be reinstated.

ARGUMENT

I.

THE TSSAA HAS ALWAYS BEEN CONSIDERED A STATE ACTOR.

A. Court Decisions Have Treated the TSSAA as a State Actor.

Over years, in several federal court decisions, the TSSAA has been considered a state actor. Furthermore, in several of the cases, the TSSAA did not even argue otherwise. Thus, constitutional requirements were either deemed to apply, or were expressly held to apply. *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1977) (TSSAA presumed to be state actor); *Graham v. TSSAA*, 1995 WL 115890 (E.D. Tenn. 1995), *appeal dismissed* (mootness), 107 F.3d 870 (Table), 1997 WL 76958 (6th Cir. 1997) (TSSAA held state actor under *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990) (TSSAA held state actor because of state delegation of authority and composition of TSSAA's membership); *Carnes v. TSSAA*, 415 F. Supp. 569 (E.D. Tenn. 1976) (TSSAA presumed to be state actor; held that prohibiting girls from playing on a mixed high school baseball team was unconstitutional; determination did not stand or fall on whether or not TSSAA was "designated" rather than "authorized" to govern interscholastic sports; TSSAA simply did, in fact, govern interscholastic sports); *Kelley v. Metropolitan County Board of Education*, 293 F. Supp. 485 (M.D. Tenn. 1968) (TSSAA held state actor, over its assertion, among other things, that it was a voluntary association).

B. The Sixth Circuit's Efforts to Distinguish Prior Cases Do Not Withstand Scrutiny.

In finding that the TSSAA is not a state actor in this case, the Sixth Circuit distinguished its earlier opinion in *Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n*, 647 F.2d 651 (6th Cir. 1981).

Brentwood Academy v. TSSAA, 180 F.3d 758, 764-765 (6th Cir. 1999). In *Yellow Springs*, the Court of Appeals examined the Ohio High School Athletic Association and found, based on factors which closely parallel those here, that the OHSAA was a state actor based on the so-called "joint participation" test. In *Brentwood Academy*, 180 F.3d at 765, the Court of Appeals distinguished *Yellow Springs* by saying that the finding of state action had been dictum because the OHSAA's actions violated Title IX. This may be why *Yellow Springs* might not bind the Court of Appeals, *per se*, but it ignores one decisive point: It defies logic to hold that the OHSAA was a state actor and the TSSAA is not. The same badges of joint participation exist in *Brentwood Academy* as existed in *Yellow Springs*.

The fact that these earlier courts did not all engage in exhaustive analyses of the question does not mean that the decisions or assumptions of the courts were not correct. Rather, it means that the TSSAA's status as a state actor is obvious and that exhaustive analysis is not needed.

II.

THE 1995 AMENDMENT TO THE BOARD OF EDUCATION'S RULE DID NOT CHANGE THE TSSAA'S STATUS AS A STATE ACTOR.

The District Court meticulously developed the overwhelming evidence that the TSSAA is a state actor. *Brentwood Academy v. TSSAA*, 13 F. Supp. 2d 670, 673-685 (M.D. Tenn. 1998). The Sixth Circuit Court of Appeals almost entirely ignored this evidence. *Brentwood Academy v. TSSAA*, 180 F.3d 758, 762 (6th Cir. 1999). The Court of Appeals recited very few facts in support of its conclusion that the TSSAA is not a state actor, and the facts that it recited were largely irrelevant. *Id.* It relied heavily upon a change in the rules purporting to articulate the relationship between the Tennessee Board of Education (hereinafter, the "Board") and the TSSAA, saying only that the former rule had been "repealed." *Id.*

The TSSAA has governed high school interscholastic sports since the 1920's. 13 F. Supp. 2d at 675. In 1972, the Board issued a rule that designated the TSSAA "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." *Id.* at 680.

In 1995, the Board changed the wording of the rule. The District Court perceived that this change was a shield to protect the TSSAA against just such litigation as this. *Id.* at 681. The new rule reads:

> The State Board of Education recognizes the value of participation in interscholastic athletics and the role of the Tennessee Secondary School Athletic Association in coordinating interscholastic athletic competition. The State Board of Education authorizes the public schools of the state to voluntarily maintain membership in the Tennessee Secondary School Athletic Association.

Id.

This is a distinction without a difference. There has been no meaningful change in the true relationship or operations of the Board and the TSSAA.

Interestingly, the unchanging nature of the relationship was pointed out with pride at page 2 of the Respondents' Brief in Opposition to the Petition for Writ of Certiorari (hereinafter, "Brief in Opposition"). It stated that the Board's promulgation of the 1972 rule had no effect on the manner in which the TSSAA operated.

In making this point, the TSSAA falls on its own sword. If the enactment of the "delegation" rule in 1972 had no effect upon the actual relationship between the entities, neither did the 1995 amendment which changed the wording of the rule from "delegate," etc., to "recognize" and "authorize."

Since the TSSAA implicitly conceded that the functional reality of its relationship with the Board was decisive when the Board enacted the 1972 rule, the Sixth Circuit — as the District Court did — should have analyzed the functional reality of the relationship when it examined the effect of the Board's 1995 amendment.

Yet the Sixth Circuit considered only that the 1972 rule was "repealed" in 1995, as if this made the decisive difference in the TSSAA's status. The Sixth Circuit did not consider *why* the 1972 rule was changed. The reason was presumptively as a shield against litigation. 13 F. Supp. 2d at 681. There is certainly no indication that other factors listed by the Sixth Circuit in concluding that the TSSAA is not a state actor — e.g., expenses being paid out of gate receipts from games — have meaningfully changed since the 1972 rule was in effect.

This Court has held that a court considering whether state action exists must examine the actual facts, and not just the technical or legal relationship. *See, e.g., American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 54 (1999); *United States v. Virginia,* 518 U.S. 515, 539 (1996); *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982); *Gilmore v. City of Montgomery*, 417 U.S. 556, 566 (1974); *Evans v. Newton*, 382 U.S. 296, 301 (1966).

III.

THE STATE OF TENNESSEE IN FACT REGULATES PRIVATE SCHOOLS.

The TSSAA postures itself as if its regulation of private school participation in interscholastic sports were simply an afterthought — as if its private school members were merely incidental to its real purpose, which is to regulate public school participation in interscholastic sports. Of course, one would expect that the overwhelming majority of TSSAA member schools would be public. This fact does not make its governance of private schools any less a part of the entirety of the Tennessee

education system — just as its governance of high school sports in general is part of the overall Tennessee education system.

In actuality, the State does regulate private schools in Tennessee, and has a substantial interest in doing so.

Tenn. Code Ann. Title 49 governs education in Tennessee. Tenn. Code Ann. § 49-1-201 (1996) sets forth the powers of the Commissioner — *i.e.*, the Department — of Education. Section 49-2-201(c)(19) makes it clear that the Department of Education has substantial powers over private schools:

> The commissioner shall provide direction through administrative and supervisory activities designed to build and maintain an effective organization as follows:
>
> . . .
>
> (19) Inspect, approve and classify such private schools of grades one (1) through twelve (12), as well as nursery schools and/or kindergartens, or any combination of these, as shall request such inspection, approval and classification; provided, that the same standards as are used for the approval and classification of the public schools shall be used for such inspection, approval and classification; . . .

Tenn. Code Ann. § 49-1-301 (1996) sets forth the powers and duties of the Board. Pursuant to § 49-1-301, the rules of the Board contain Chapter 0520-7-1, pertaining to Administrative Rules for Non-Public Schools, and Chapter 0520-7-2, pertaining to Non-Public School Approval Process. A copy of these Chapters is appended to this Brief as Appendix A.

Among the rules governing private schools is Tenn. Bd. of Ed. Rule 0520-7-2-.03(6)(c)9, which requires that to be approved to accredit private schools, accrediting agencies must

> Publish and follow minimum standards using the following criteria (or the agency may use the standards as set forth in the Rules, Regulations and Minimum Standards for the Governance of Public Schools in the State of Tennessee):
>
> (i) Curriculum and Graduation:
>
> I. The program shall include (but not be limited to) the areas of reading, composition, speech, mathematics, social studies, science, art, music, *health and physical education*. . . .
>
> III. Each student shall meet the same minimum requirements for graduation as students in public schools. The specific requirements are listed in Chapter 0520-1-3.

(Emphasis added).

Moreover, "Category I" schools are those directly approved by the Department of Education. Tenn. Bd. of Ed. Rule 0520-7-2-.01(1)(a). The criteria and procedures for evaluating such schools are the same as for public schools. Tenn. Bd. of Ed. Rule 0520-7-2-.02(1).

Also, it is significant that students can transfer between public and private schools without loss of credit for completed work. Tenn. Bd. of Ed. Rule 0520-7-1-.03.

In this context of wider regulation than merely sports, the Court must assess as state action the TSSAA's governance of private as well as public secondary schools' interscholastic athletics. The incidents of this governance are very thoroughly discussed in the Brief of Petitioner, Brentwood Academy, and in the District Court opinion, 13 F. Supp. 2d at 673-685. The TSSAA's governance of private school athletics is part of a much larger whole.

IV.

IT IS IRRELEVANT THAT PETITIONER, BRENTWOOD ACADEMY, IS A PRIVATE SCHOOL.

A. *NCAA v. Tarkanian* Supports a Finding that the TSSAA is a State Actor.

The question before this Court is whether the TSSAA is a state actor. Either it is a state actor, or it is not. It cannot be a state actor with respect to some of the schools that it governs, without being a state actor as to the other schools that it governs.

There has been much discussion of Footnote 13 of the *Tarkanian* case, *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13 (1988). This footnote states, in its entirety:

> The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, *many of them public institutions* created by the same sovereign. See Clark v. Arizona Interscholastic Association, 695 F.2d 1126 (CA9 1982), cert. denied, 464 U.S. 818, 104 S. Ct. 79, 78 L. Ed. 2d 90 (1983); Louisiana High School Athletic Association v. St. Augustine High School, 396 F.2d 224 (CA5 1968). The dissent apparently agrees that the NCAA was not acting under color of state law in its relationships with private universities, which constitute the bulk of its membership. See post, at 202, n. 2.

Id. at 193 (emphasis added).

This footnote and the text to which it relates are thoroughly discussed in the Brief of Petitioner, Brentwood Academy. The "situation" referred to in Footnote 13 is the fact that the NCAA is a national organization governing collegiate sports, comprised of colleges and universities all over the country. The NCAA does not derive any meaningful authority from the State of Nevada. Therefore, it is not a "state actor" in connection with Nevada. *Id.*

The majority opinion in *Tarkanian* was addressing the "membership/control" test in the text relating to Footnote 13. It correctly held that the NCAA was not a state actor of the State of Nevada because of the absence of control over the NCAA by the State of Nevada. Footnote 13 contrasted that fact situation to the fact situation that would exist if the schools controlled by the athletic association were all within one state.

The four dissenting Justices in *Tarkanian* would have found state action under the "joint participation" test. *Id.* at 202. Thus, Footnote 13 was a comment by the majority in response to the dissent. But the majority and the dissenting Justices were addressing two different tests for state action. The Sixth Circuit failed to recognize that distinction. 180 F.3d at 766.

The Sixth Circuit's interpretation of Footnote 13 is refuted by the language of the footnote itself. The first sentence of the footnote reads: "The situation would, of course, be different if the membership consisted entirely of institutions located within the same State, *many of them public institutions* created by the same sovereign." Clearly, the majority was conscious of the fact that not all schools within one state, which might be governed by a state's athletic association, would be public schools. It is impossible to read Footnote 13 and conclude that a state athletic association that governs both public schools and private schools is a state actor when governing public schools and not a state actor when governing private schools. Footnote 13 simply does not stand for that proposition.

It is ironic, for the Sixth Circuit and the TSSAA, that the last sentence of Footnote 13, which was relied upon by the Sixth Circuit in finding that the TSSAA was not a state actor, was a reference to the dissent. The dissenting Justices would have held that the NCAA was, indeed, a state actor under the "joint participation" test. TLAW respectfully asserts that even under the dissent in *Tarkanian*, the TSSAA is a state actor when governing intra-state private schools. In *Tarkanian*, the "concert" in question was between a single school within a state and the

national governing body, which was not based in Nevada. In the instant case, the TSSAA is an intra-state body, and the concert in question is both (1) between the TSSAA and its governing body, the Board and (2) between the TSSAA and the entire school system of Tennessee.

Additionally, as is discussed in Section III at pages 8-10, *supra*, the State of Tennessee governs and regulates private schools beyond simply their interscholastic sports.

B. The Facts Present in this Case Demonstrate the Irrelevance of Private Versus Public School Status.

i. The TSSAA's Rules Affect Both Public and Private Schools and Students.

The District Court pointed out that the Recruiting Rule, which is the basis for Brentwood Academy's First Amendment challenge, actually constrains both public and private schools. 13 F. Supp. 2d at 686-691. What emerges is that public schools, as well as private schools, are affected by the Recruiting Rule. If the TSSAA is a state actor in limiting the ability of a public school coach to contact a potential student athlete based upon a "feeder pattern," the TSSAA is also a state actor when imposing such a limitation on a private school coach.

Further, the TSSAA's actions affect not only *schools*, but also *students*. The rights of public school students are affected by the TSSAA's governance in general, and by the Recruiting Rule in particular. This is not simply a matter of a challenge by a private school. The rights of an individual student must not depend on whether he or she attends a public or private school.

ii. The TSSAA is Controlled by Public Officials.

The TSSAA will always be dominated by public school officials. The preponderance of public over private schools that are members will be outcome determinative. Thus, it does not matter that there may be an occasional or a few members of its governing body that are private school officials. There will never

be sufficient private school membership to allow private schools the possibility of setting policy. Mere private school *participation* cannot remove the cloak of state action, since public *control* remains firmly in place. TSSAA cannot escape state actor status by setting aside some token representation by private school officials.

iii. Public and Private Schools Use Each Other's Property.

There is also a blurring of the line of demarcation when one considers the fact that public and private schools use each other's facilities for events. Private school students, parents, coaches and faculty enter onto public property when they play games at public schools. Public school students, parents, coaches and faculty enter onto private school property when they play games at private schools.

V.

THE TESTS FOR FINDING STATE ACTION ARE MET IN THIS CASE.

A. The "Membership/Control" and "Joint Participation" Tests Are Met.

The Brief of Petitioner, Brentwood Academy, and the District Court opinion, 13 F. Supp. 2d at 679-685, thoroughly discuss the tests for judging whether an entity is a state actor, including the "membership/control" and "joint participation" tests. TLAW will not here attempt to duplicate its discussion.

TLAW underscores the undisputed facts of this case, which were discussed in great detail in the District Court opinion, and which the District Court found to be "overwhelming," 13 F. Supp. 2d at 683, but were not discussed in any meaningful way in the Court of Appeals opinion, 180 F.2d at 763-764.

As to "control," it must be emphasized that the Board's own rules affirmatively state that the TSSAA's rules are subject to its approval. By definition, this is control. Why would the

Board approve the TSSAA's rules if it did not believe that the TSSAA was under its aegis? What purpose would be served if the Board knew that its approval was of no force or effect — or, as the TSSAA says, that it was "ceremonial," Brief in Opposition at 3. TLAW is not aware that the *Board* has ever characterized its own role as "ceremonial," and wonders if it would be surprised that its role is so described. Would the Board consider its role "ceremonial" if the TSSAA usurped some clear authority of the Board, or did something that contravened the Board's policy, or that exposed it to litigation?

The District Court's opinion irrefutably points out why the TSSAA's characterization as "ceremonial" was completely untrue. 13 F. Supp. 2d at 680-681. The District Court concluded its chronology of the Board's pattern of active review and approval of the TSSAA's rules, over a period of years, by saying,

> It is disingenuous, at best, for Defendants to repeatedly state in their briefs, based upon testimony of Defendant Carter, TSSAA Executive Director, and Mr. Sailors, State Board of Education Executive Director, that the State has never reviewed or approved TSSAA rules. Such an assertion is utterly false, as demonstrated by the minutes of the State Board of Education.

Id. at 681.

The analysis of whether an entity is a state actor may be a complicated one in some cases. In this case, TLAW respectfully contends that the analysis is quite simple. As this Court observed in *Tarkanian*,

> "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law" and avoids the imposition of responsibility on a State for conduct it could not control. *Lugar,* 457 U.S., at 936-937, 102 S.Ct. at

2753-2754. When Congress enacted [42 U.S.C.] § 1983 as the statutory remedy for violations of the Constitution, it specified that the conduct at issue must have occurred "under color of" state law; thus, liability attaches only to those wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961). As we stated in *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941): "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."

. . . In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); if it delegates its authority to the private actor, e.g., *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, e.g., *Burton v. Wilmington Parking Authority, supra*. Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

488 U.S. at 191-192.

> E.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974) ("[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself").

Id. at 192 n.12.

B. Judge Merritt's Dissent and *Communities for Equity* are Persuasive.

TLAW respectfully urges this Court to adopt the reasoning of Judge Merritt in his dissent from the Sixth Circuit's denial of the Petitioner's Motion for Rehearing, *Brentwood Academy v. TSSAA*, 190 F.3d 705 (6th Cir. 1999), and the reasoning of the United States District Court for the District of Michigan in *Communities for Equity v. Michigan High School Athletic Association*, 80 F. Supp. 2d 729 (W.D. Mich. 2000). These opinions demonstrate a full understanding of the issues and principles governing a proper analysis of the issue before the Court in the instant case.

C. The "Public Function" Test Is Also Met.

TLAW acknowledges that Petitioner, Brentwood Academy, does not press the argument that the TSSAA is a state actor under the "public function" test. Petition for Writ of Certiorari at 29, footnotte 18. However, TLAW requests that the Court consider this additional argument by TLAW, *see United States v. Dickerson*, 166 F.3d 667, 680-681 (4th Cir.), *cert. granted*, __ U.S. __, 120 S. Ct. 578 (1999).

The TSSAA argues that the "public function" test for state action is not met. Brief in Opposition at 11. It argues that coordination of amateur sports is not a function that is traditionally performed by states. Brief in Opposition at 12. Even if the "public function" test be considered weaker than the Petitioner's arguments that the "membership/control" and

"joint participation" tests are met, TLAW does not concede that the "public function" test does not apply here, or that the test fails under the facts of this case.

The TSSAA relies on cases such as *Rendell-Baker v. Kohn*, *supra*, 457 U.S. 830, 842 (1982) and *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987). These cases are not on point. *Rendell-Baker* dealt with whether a single private school was a state actor. TLAW is certainly not asserting that a traditional private school would be a state actor. The instant case is distinguishable because it is the governance of an entire aspect of the education system in Tennessee that is being challenged. *U. S. Olympic Committee* is distinguishable because the kind of amateur sports referred to in that case were not high school sports governed as part of a state's education system.

i. The "Public Function" is Education, Not Sports.

The TSSAA's and the Board's own literature emphasizes the importance of athletics. The 1995 Board rule itself states that the Board "recognizes the value of participation in interscholastic athletics and the role of [the TSSAA] in coordinating interscholastic athletic competition." 13 F. Supp. 2d at 675. The Executive Director of the Board stated that "[c]ompetitive athletics is a big part of the high school experience," and that the TSSAA "manages these activities as sanctioned by the State Board of Education." *Id.* at 681. "The athletic field and the gymnasium are classrooms in which teaching is foremost in the development of character, integrity, sportsmanship, and team work. Although the athletic program is associated primarily with physical education and the scholastic program with mental education, one complements the other." *Id.* at 684, TSSAA Constitution, Art. 1, Section 2.

Now, in this litigation, the TSSAA suddenly asserts that the public function test cannot be met because the function in question is sports, not education. "[W]hile it is an activity that may be enjoyable and sometimes valuable, it is *not* an integral

part of the public education governed by the state." Brief in Opposition at 16. In support of that position, the TSSAA makes such assertions as that there is no state statute requiring that the state provide interscholastic sports.[2] The TSSAA's argument that the regulation of interscholastic athletics is not state action because there are no state statutes governing interscholastic sports is illogical. The Board has chosen to sanction, sponsor and encourage interscholastic athletics. Significantly, it grants academic credit for participation therein. 13 F. Supp. 2d at 684, Tenn. Bd. of Ed. Rule 0520-1-3-.06.

Indeed, if there were no TSSAA, supervision of interscholastic athletics would be performed by the Board itself. Under that scenario, it would be obvious that the regulation of high school sports is within the public function of education, and is state action.

The public function that must be focused on is *education*. It is a "red herring" to say that the function in question is high school sports, and that this is not a public function. The TSSAA and the Board must be hoisted by the petard of their own public statements and, indeed, the TSSAA's own Constitution.

ii. Education is a Public Function.

The right to an education, and the duty of the State to provide it, are embodied in the Tennessee Constitution. Tenn. Const. Art. XI, Section 12.

The Tennessee Supreme Court in *Tennessee Small Sch. Systems v. McWherter*, 851 S.W.2d 139, 151 (Tenn. 1993)

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2. The Tennessee Code does not say that the schools must offer chemistry, either. However, the Board's rules require that science be part of the high school curriculum. No one would argue that teaching chemistry or any other purely academic subject is a separate function from the public function of education, *per se*. Having chosen to offer these academic subjects, the Board could not enact a rule that girls could not enroll for those subjects, or that they could only enroll for the introductory courses while boys could also enroll for the advanced courses.

recognized this right and held that funding for school districts across the state must be fairly distributed. After describing the pitiful state of education in some areas of Tennessee, and the effect upon students who live in the poorer school districts, *id.* at 143-145, the Tennessee Supreme Court held that local control over education is not a "rational basis" to sustain funding and educational discrepancies among school districts. *Id.* at 156. The state cannot absolve itself from its duty to educate its children by devolving that duty upon the localities, even though localities are certainly actively involved. If the educational function cannot be delegated to a locality, which is obviously a governmental entity, how could it be delegated to the TSSAA without the TSSAA's being a state actor?

The Board has adopted Tenn. Bd. of Ed. Rule 0520-7-2-.03(6)(c)9(i)(I), which mandates essentially that health and physical education be taught by every accredited private school under its aegis. *A fortiori*, this is required of public school education. *See* Tenn. Bd. of Ed. Rules 0520-6-10-.01, *et seq.*

Employees of TSSAA, including Respondent Carter, are covered by the State retirement system and, by statute, are included in the definition of "teachers" for that purpose. Tenn. Code Ann. § 8-35-118. 13 F. Supp. 2d at 684.

Certainly, no one will be killed or maimed as a result of the choice that the TSSAA blithely says is available — resigning from the TSSAA. That choice might be available in a hypothetical sense. But it is not realistic. Member schools should not be forced to make such a choice. There is no guarantee that a private school athletic association would be formed, that such an association would be viable with so few schools as members, or that there would be any cooperation or coordination between the two associations or among the schools. It cannot be assumed that a system of separate associations would allow private schools to compete against public schools at all, or to compete for championships. In effect, private schools and their students would be cut off from intercourse with the cross section of other

schools and other people that is so vital to young people in the formative years. As noted above, it is the students that suffer the consequences of these choices — made, of course, by adults — that look perfectly viable on paper but would be devastating in real life.

This Court in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978), a commercial case, observed as follows:

> And we would be remiss if we did not note that there are a number of state and municipal functions not covered by our election cases or governed by the reasoning of Marsh which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called "dispute resolution." Among these are such functions as education, fire and police protection, and tax collection. [Footnote omitted.] We express no view as to the extent, if any, to which a city or State might be free to delegate to private parties the performance of such functions and thereby avoid the strictures of the Fourteenth Amendment.

Id. at 163-164. TLAW asks the Court to take this opportunity to rule unequivocally that education is unequivocally a public function.

Alternatively, this Court should defer to the Tennessee Supreme Court's holding in *McWherter, supra*, and acknowledge that education is a public function under Tennessee law.

VI.

UNITED STATES v. VIRGINIA SUPPORTS THE POSITION THAT THE TSSAA IS A STATE ACTOR.

TLAW asserts that *United States v. Virginia*, 518 U.S. 515 (1996) (hereinafter, the "VMI case") is relevant to an understanding of the present case, even if this relevance is not apparent at first blush. The Court held that the Commonwealth of Virginia must make available to "her daughters" the same opportunity that it had made available since 1839 to "her sons," that is, the opportunity to be educated under the unique adversative system of the Virginia Military Institute. The Court compared a separate, women-only quasi-military program called the Virginia Women's Institute for Leadership ("VWIL") that the Commonwealth had set up in partnership with Mary Baldwin College, located not far from VMI. This had been devised in an effort to comply with earlier rulings that the Commonwealth had to make available to women an education comparable to that available to men at VMI, while preserving the traditional single-sex education that has proven to be beneficial to some men and some women. The Court compared the features of the facility, the system, and the education at VMI with those of the VWIL. It found that the VWIL was but a pale substitute for VMI, and did not pass constitutional muster. One factor that the Court mentioned was the superior athletic facilities at VMI. *Id.* at 552.

A. If a Service is Provided, It Must Be Provided Fairly to All.

It has been argued in the instant case that high school athletics are not a public function because there is no constitutional right to engage in sports, and there is no statutory duty to provide a sports program, *per se*. *Brentwood Academy*, 180 F.3d at 763, Brief in Opposition at 11. Similarly, it was pointed out in the VMI Case that there is no constitutional right to the adversative system under which VMI operated, nor was the Commonwealth of Virginia required to have a school that

operated under the adversative system. But, since the Commonwealth of Virginia did, in fact — as it was free to do — provide such a system to males, at a prestigious facility with an excellent faculty and a wide variety of educational opportunities, then the Commonwealth could not deny to females a comparable opportunity. *Id.* at 555. This principle applies to the governance of sports by the Board and the TSSAA.

B. Schools and Students Should Not Be Deprived of a Viable Choice.

It has been argued in the instant case that because the TSSAA is voluntary, a dissenting school can simply withdraw from the Association if it does not like its rules. Of course, if this happened, the students at that school would have no opportunity whatsoever to participate in a full program of interscholastic sports. They would have no chance to become state champions at any sport. There would be fewer schools that they could play. They might have to travel much farther in order to play whatever schools they could play.

This dilemma was answered by this Court in the VMI Case. In reality, if women could not attend VMI, they " 'have no opportunity anywhere to gain the benefits of [the system of education at VMI].' " *Id.* at 523. Under the VMI ruling, women should not have to be either relegated to the program under the VWIL, or have no program at all. They were entitled to a program equivalent to that which men could obtain at VMI.

Likewise, Tennessee high school students, be they women students or private school students, should not be deprived of the possibility of playing interscholastic sports because the TSSAA imposes arbitrary or punitive rules.

C. The Court Should Examine the Actual Facts and Not Those Articulated in Response to, or in Anticipation of, Litigation.

Virginia argued that its basis for keeping VMI all male was to provide educational diversity. *See id.* at 525, 534-535. This rationale was articulated after the fact; it had never really been why VMI was all male. As was pointed out in the concurring opinion, diversity was not even articulated as a reason to remain all male when a study was commissioned in the wake of *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). This Court in the VMI Case held that it must look at the real reason for imposing a requirement, and not merely the reason that is articulated. *Id.* at 535-536.

Likewise, it is not enough for this Court in this case to consider the naked fact that the Board amended its rule in 1995. As TLAW has previously contended, this Court should not defer to the contrived 1995 change of the Board's rule, promulgated in anticipation of litigation. As the Court stated in the VMI Case, "the justification must be genuine, not hypothesized or invented post hoc in response to litigation." *Id.* at 516.

VII.

THE TSSAA MUST BE HELD TO BE A STATE ACTOR IN ORDER TO ASSURE THAT WOMEN STUDENTS WILL BE AFFORDED THEIR CONSTITUTIONAL RIGHTS.

A. The TSSAA's Action Against a School is in Reality a Punishment of the Students.

The TSSAA governs high school sports. It can require schools, i.e., coaches, students, and school administrators, to do and not to do certain things. It can punish them if they disobey.

Brentwood Academy, or any school, public or private, may be a legal entity, and it may be bricks and mortar and turf and bleachers and goalposts, but its raison d'être is to provide an education and protect the interests of its students. A school does not exist as an end unto itself, but to serve the students and the community.

Athletics must be looked at in that context. Excellence in athletics is not the only kind of excellence to which schools and students aspire. All schools want to turn out National Merit Scholars, science fair winners, Model UN participants, and Quiz Bowl, Latin and debate champions. All these are educational functions, even though a student has no constitutional right to participate in any particular one of these activities.

In reality, it is the students who are harmed by TSSAA's imposition of sanctions or unconstitutional rules. *See* the District Court's discussion at 13 F. Supp. 2d at 691. The harm to the schools represents harm to the students and prospective students for whom the school exists.

The District Court pointed out, *id.* at 693, that the TSSAA possesses unbridled discretion to penalize those expressing points of view with which it disagrees. The challenged limitations upon communication can be applied to both public school students and private school students.

TLAW agrees with Brentwood Academy's concern that children are being looked at as creatures of the state. *See* Petition for Writ of Certiorari at 11-14.

Cavalierly, the TSSAA says at page 16 of its Brief in Opposition that a school is free to withdraw from the TSSAA. If that happens, it is of course the students who are ultimately hurt; the students who are deprived of this beneficial aspect of their educations and of their preparation for life; the students who will be deprived of the opportunity to play varsity college sports. It is also fair to say that losing the opportunity to play against a variety of teams, including teams from private schools, is detrimental to public school athletes.

TLAW does not take a position as to what kind of school is "best," but contends that there should be a diverse educational system. A prospective student should have as many choices as possible. By definition, most students simply attend the public school, good or bad, large or small, rural or urban, for which they are zoned. But some inner-city students may have the opportunity, for whatever reason, to attend a private school. Some wealthy students will have the opportunity to attend a private school. Some public school students will have the opportunity to attend a special public "magnet" school. Therefore, public and private schools and their students should not artificially be separated from one another. The students who attend them should interact, whether at science fairs, debate tournaments, mock trials or, yes, athletic events. This is worthwhile and should not be withheld because of the hubris of the adults and the governmental bodies who are in charge.

B. Participation in Athletics is Beneficial on Many Levels for Young Women, and the Court Must Be Vigilant to Protect Their Rights to Access In General.

Many court decisions have addressed the need to protect women's access to athletics. TLAW will not discuss the numerous studies and other evidence supporting the importance and benefit to young women of participating in sports, for their characters, their physical and emotional well-being, and their future educational and career opportunities, among others. This subject has been addressed thoroughly and skillfully in the brief of *amicus curiae* the National Women's Law Center.

See also United States v. Virginia, 518 U.S. 515 (1996), which discussed the intangible benefits to young women of certain kinds of extracurricular activity and training, and held that these should be made available to young women as well as to young men.

Additionally, by enacting Title IX, Congress enunciated that it is the public policy of this nation that women shall be treated fairly in their access to athletic opportunities. Congress

went as far as it could go in requiring sports programs at facilities which receive federal money, to assure women this access. TLAW will also not cite to the evidence that discrimination against female athletes lingers. TLAW again refers the Court to the brief of *amicus curiae* the National Women's Law Center.

C. The Court Must Be Vigilant to Protect Women Athletes from the Actions of the TSSAA, in Particular.

TLAW emphasizes that the TSSAA's history of arbitrary and even punitive action is well established. TLAW respectfully begs this Court not to consider this case in a vacuum, but rather to be cognizant of the TSSAA's pattern of behavior.

In *Crocker v. TSSAA*, 735 F. Supp. 753 (M.D. Tenn. 1990), a student with a learning disability transferred to McGavock High School, a public school in Nashville, and wanted to play football. The District Court ordered that he be allowed to play. The TSSAA had to be enjoined from stripping the school of its wins and trophies for complying with the court order. It is interesting to note that, after the litigation was concluded, the student lost his case, and the only remnant of the original case that still stood was the ruling that the TSSAA could not strip McGavock of its wins and trophies. *Crocker v. TSSAA*, 47 F.3d 1168 (Table), 1995 WL 14108 (6th Cir. 1995).

In *Kelley v. Metropolitan County Board of Education of Nashville and Davidson County*, 293 F. Supp. 485 (M.D. Tenn. 1968), the TSSAA was held to have denied an all-black school its due process rights by suspending it for a year without setting preexisting standards and without a formal charge.

In *Cape v. TSSAA*, 563 F.2d 793 (6th Cir. 1977) and *Carnes v. TSSAA*, 415 F. Supp. 569 (E.D. Tenn. 1976), the courts addressed the TSSAA's requirement that girls play basketball under different rules from boys, which allegedly made it impossible for girls in Tennessee to qualify for college basketball scholarships. *Cape* pointed out, 563 F.2d at 794-795, that Tennessee was one of the last five states to require women to play under the old rules.

In the VMI Case, *supra*, the Court analyzed its gender-discrimination cases and the evolution of the "intermediate scrutiny" standard, 518 U.S. at 531-533. Whether or not one agrees with the specific ruling in the case, which led to women's being admitted to VMI, and whether or not a new "exceedingly persuasive justification" test is applied to cases of gender discrimination, the current standard is certainly at least an "intermediate scrutiny" standard. *See* dissenting opinion, *id.* at 566-603.

The most likely forms of discrimination to occur if the TSSAA is not held to be a state actor will be gender and racial discrimination, or at least discrimination that unfairly burdens and discriminates against female athletes. TLAW respectfully asserts that this Court should be conscious of this and vigilant to protect against this outcome.

It would defy logic for the TSSAA to succeed in evading constitutional consequences because of mere semantics, when the TSSAA's conduct, and its relationship to the Board, are so very similar to those described in the numerous cases finding that state athletic associations were state actors. If this Court affirms the Sixth Circuit, then, since other states surely have clever people watching this case, the progress that has been made will begin eroding before the ink is dry on this Court's opinion.

If there is no disincentive to their doing so, the Board and the TSSAA are entirely likely, based on their past conduct, to engage in an endemic pattern of unconstitutional discrimination and denial of women's and other athletes' equal protection and other constitutional rights that are guaranteed to them as part of their right to an education and the state's duty to educate them.

What the TSSAA is really trying to protect is the interests of public schools in students' not attending private schools — public/private school rivalry, as it were. This is clear from the Sixth Circuit's opinion, which opens with observations about Brentwood Academy's athletic prowess. 180 F.3d at 760. TLAW

takes no position on whether public or private schools are inherently better. However, what education is about is the good of the student, and the ultimate good of society derived from having the best-educated, best-prepared population that there can possibly be. One's instinct would tell one that this is accomplished by having a diverse educational system, and to have every school provide the best education possible. No school or group of schools should be treated as if it had some sort of proprietary rights in Tennessee students.

Thus, the bodies that govern the educational system, or entire facets of the educational system, must be held accountable. These bodies exist to serve the public. They must, therefore, be held to be state actors. They must be required to provide students the constitutional rights to which they are entitled. If the Tennessee Board of Education and the TSSAA are allowed to set policy and impose penalties as they have done here, and as they did in the *Crocker*, *Cape, Kelley* and *Carnes* cases, *supra*, then our children, their families, and, ultimately, society, will suffer.

The Sixth Circuit's decision is purely and simply a wrong decision. It cannot be distinguished from the Sixth Circuit's earlier decisions. It cannot be distinguished because statements in earlier opinions are said to have been dictum, in cases which could not have been decided as they were without the premise that the TSSAA is a state actor. It cannot be upheld on the ground that the Tennessee Board of Education "repealed" the rule that the TSSAA was "designated" the governing body, without looking at what replaced the former rule. The Sixth Circuit's decision cannot be distinguished from the rulings in other circuits. In short, the Sixth Circuit decision does not withstand either a proper legal analysis or the test of common sense.

CONCLUSION

For the foregoing reasons, *amicus curiae* The Tennessee Lawyers' Association for Women respectfully requests that this Court hold that education is a public function generally or, alternatively, under Tennessee law; that this Court hold that the Tennessee Secondary Schools Athletic Association is a state actor and that its actions governing high school-athletics in Tennessee are state action; and that this Court reverse the decision of the Sixth Circuit Court of Appeals and reinstate the ruling of the U. S. District Court for the Middle District of Tennessee.

Respectfully submitted,

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APPENDIX

APPENDIX — RULES INVOLVED

RULES
OF
THE STATE BOARD OF EDUCATION

CHAPTER 0520-7-1
ADMINISTRATIVE RULES—
NON-PUBLIC SCHOOLS

TABLE OF CONTENTS

0520-7-1-.01	Creation of the Advisory council for Non-Public Schools	0520-7-1-.02	Repository for Permanent Records
		0510-7-3-.03 [sic]	Student Transfers

0520-7-1-.01 CREATION OF THE ADVISORY COUNCIL FOR NON-PUBLIC SCHOOLS.

(1) The Commissioner of Education shall appoint a nine member Advisory Council for Non-Public schools to advise the Department of Education on policies relating to non-public school administration.

(2) The term of each council member shall be for three years and members may be re-appointed.

Authority: *T.C.A §§ 49-1-302.* ***Administrative History:*** *Original rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

Appendix

0520-7-1-.02 REPOSITORY FOR PERMANENT RECORDS.

(1) Non-public schools which cease operation shall place their student academic and attendance records in the office of the appropriate school administrator as specified below:

(a) Schools which merge, consolidate, or undergo change of ownership shall deposit their records with the continuing school.

(b) Schools which are a part of a system, organization, franchise or a ministry of a local church or a group of churches shall deposit their records with the appropriate ongoing administrative office;

(c) Schools may deposit their records with another private school in the near vicinity; or

(d) Unless records are deposited in accordance with (a), (b), or (c) above, schools shall deposit their records with the local public school system where the non-public school was located.

(2) Non-public schools which cease operation shall notify the superintendent of the public school system and the State Department of Education.

(3) Non-public schools which cease operation shall publish the location of student records in local newspapers.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *Original rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

Appendix

9520-7-1-.03 STUDENT TRANSFERS

(1) Students may transfer among public schools, or Category I, II or III non-public schools (for definition of categories, see Chapter 0520-7-2), without loss of credit for completed work. See Chapter 0520-1-3. The school which the student leaves must supply a properly certified transcript showing the student's record of attendance, achievement, and the units of credit earned. However, this rule shall not be construed as to supersede any contractual obligation of parents with the non-public school (e.g. withholding of grades until all tuition/fees are paid).

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *Original rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

Appendix

CHAPTER 0520-7-2
NON-PUBLIC SCHOOL APPROVAL PROCESS

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0520-7-2-.03	Category II: Agency Approval		
0520-7-2-.04	Category III: Southern Association of Colleges and Schools		

0520-7-2-.01 CATEGORIES.

(1) There shall be five categories of non-public schools in Tennessee:

(a) Category I schools are those approved individually by the State Department of Education;

(b) Category II schools are those which belong to an agency whose accreditation process is approved by the State Board of Education;

(c) Category III schools are those which are members of the Southern Association of Colleges and Schools (SACS);

(d) Category IV schools are those schools which are "church related" and exempt from regulations according to T.C.A. 49-50-801;

(e) Category V schools include all other schools, except home schools, as defined in T.C.A. 49-6-3050.

Authority: *T.C.A. §§ 49-1-302 and 49-6-3001.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

0520-7-2-.02 CATEGORY I: STATE DEPARTMENT OF EDUCATION APPROVAL.

(1) A school may seek state approval by direct application to the State Department of Education. The criteria and procedures used in the evaluation of such schools are the same as for the public schools.

(2) Each school shall comply with the requirements of T.C.A. 49-6-3007 regarding the reporting of the names, ages, and addresses of all pupils in attendance to the superintendent of the public school system in which the school is located.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

Appendix

0520-7-2-.03 CATEGORY II: AGENCY APPROVAL.

(1) The State Board of Education may approve the school approval procedures of non-public school accrediting agencies.

(2) Schools holding full accreditation status with an approved agency are approved by the State Department of Education.

(3) Home schools which may affiliate with an approved agency are not approvable under this category.

(4) Procedures for application as an Approved Non-Public School Accrediting Agency.

(a) An agency seeking approval shall apply to the State Department of Education and shall supply relevant information needed by the department.

(b) The State Department of Education shall review the application of the agency with respect to the criteria for approval and recommend to the State Board of Education that the application be approved or denied. The applicant agency may address the State Board of Education at the time its application is being considered.

(5) Period of Approval.

(a) The period of approval for a recognized agency shall be five years.

(b) An agency which fails to meet the minimum standards for agency approval will have its approval revoked.

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(6) Criteria for Approval of a Non-Public School Accrediting Agency.

(a) Scope of Operation of Agency. The agency shall:

1. Have a clearly written statement of its objectives.

2. Delineate the process by which it approves schools; and

3. Have at least five member schools, each with at least ten full-time students.

(b) Organization of agency. The agency shall:

1. Specify qualifications for professional personnel for the agency.

2. Employ at last one full time director or superintendent; and

3. Be permitted to regulate schools which are not fully approved.

(c) Agency Responsibilities. The agency shall:

1. Maintain written descriptions of the requirements for school accreditation, and of the levels or types of membership granted;

2. Re-evaluate approved schools annually;

3. Give advance publication of proposed changes in approval standards to schools. These changes must be approved in advance by the State Department of Education;

4. Advise schools or directly provide them with technical assistance to address deficiencies;

5. Publish approval policies and lists of approved schools;

6. Require schools to report on deficiencies which could affect approval status;

7. Have procedures for revocation of approval;

8. Provide a list of all courses taught and the grade levels at which they are taught at each school;

9. Publish and follow minimum standards using the following criteria (or, the agency may use the standards as set forth in the Rules, Regulations and Minimum Standards for the Governance of Public Schools in the State of Tennessee):

(i) Curriculum and Graduation.

(I) The program shall include (but not be limited to) the areas of reading, composition, speech, mathematics, social studies, science, art, music, health and physical education.

(II) Each school shall use print and nonprint materials, including textbooks, which are adequate to meet the needs of the instructional program. See Chapter 0520-1-3.

(III) Each student shall meet the same minimum requirements for graduation as students in public schools. The specific requirements are listed in Chapter 0520-1-3.

(ii) Inservice. Each school shall have a minimum of five days for inservice education per school year.

(iii) Teacher Licensure and Evaluation.

(I) Each agency shall submit its procedures for licensing teachers. If the agency does not use the Tennessee State Department of Education licensure system, it must use a comparable system based upon educational training.

(II) Each teacher or principal shall hold a valid teacher license or permit as defined by the agency covering the work assignment.

(III) Each agency shall develop procedures for evaluation of all professional school personnel.

(iv) Facilities.

(I) Each school shall comply with rules, regulations, and codes of the city, county, and state regarding planning of new buildings, alterations, and safety.

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(II) Each school shall observe all fire safety regulations and procedures promulgated by the Tennessee Fire Marshal's Office.

(III) Each school shall have classrooms, laboratories, and libraries which are sufficient in number, adequate in space, and so constructed and arranged as to be conducive to carrying on the assigned activities. Playgrounds and physical education facilities shall be well maintained, free from hazards, and large enough to permit an adequate program of physical education.

(v) Administrative Rules.

(I) Each school shall maintain an operating schedule that includes the minimum number of instructional days and hours required of public schools. See Chapter 0520-1-3.

(II) Each school which provides services to students certified as eligible students with disabilities shall meet all standards of the State Board of Education rule 0520-1-3-.09.

(III) A child entering first grade shall be no less than six years of age on or before September 30. Any child five years of age on or before September 30 may be enrolled in kindergarten.

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(IV) Each school shall develop and implement a written policy on promotion and retention. The written policy shall be communicated to students and parents.

(V) The maximum enrollments for an individual class shall be specified and shall not exceed state maximum class sizes for the same subject and grade level.

(VI) Each school shall maintain complete and accurate permanent records. A cumulative record for each student for all work through high school is required.

(VII) Each school shall evaluate records and report the needs and progress of its pupils.

(VIII) Each school shall provide a sufficient number of appropriately qualified administrators, librarians and guidance counselors for the student body served.

(IX) Each principal or headmaster shall comply with the requirement of T.C.A. 49-6-5001 that each child enrolled in school be vaccinated against disease.

(X) Each principal or headmaster shall comply with the requirements of T.C.A. 49-6-3007 regarding reporting the names, ages, and addresses of all pupils in attendance to the superintendent of the public school system in which the school is located.

(vi) Testing Program. At least once every school year, each school shall give a nationally standardized achievement test covering the areas of reading, language arts, spelling, math, science, and social science to each pupil in grades 2 through 8 and grad 10; the results must be communicated to teachers and parents and kept on file at the school for one calendar year.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

0520-7-2-.04 CATEGORY III: SOUTHERN ASSOCIATION OF COLLEGES AND SCHOOLS.

Schools in this category are accredited by the Southern Association of Colleges and Schools according to the procedures established by the association.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

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0520-7-2-.05 CATEGORY IV: EXEMPTED SCHOOLS.

(1) Schools in this category are exempt from regulation regarding faculty, textbooks, and curriculum. T.C.A. 49-50-801 defines a church related school as "a school operated by denominational, parochial or other bona fide church organizations, which are required to meet the standards of accreditation or membership of the Tennessee Association of Christian Schools, the Tennessee Association of Independent Schools, the Southern Association of Colleges and Schools, the Tennessee Association of Non-Public Academic Schools, or a school affiliated with Accelerated Christian Education, Inc." Exempt schools are not state approved unless they voluntarily request to be associated with a non-public school accrediting agency, seek full state approval, or approval from the Southern Association of Colleges and Schools (SACS).

(2) Each school shall:

(a) Comply with all rules and regulations and codes of the city, county, and state regarding planning of new buildings, alterations, and safety.

(b) Comply with all rules and regulations of Tennessee Department of Health and Environment regarding construction, maintenance, and operation of the school plant.

(c) Serve all fire safety regulations and procedures promulgated by the Tennessee Fire Marshal's Office.

(d) Comply with the requirements of T.C.A. 49-6-5001 that each child enrolled in school be vaccinated against disease.

(e) Comply with the requirement of T.C.A. 49-6-3007 that the names, ages, and addresses of all pupils in attendance be reported to the superintendent of the public school system in which the school is located.

Authority: *T.C.A. §§ 49-1-302 and 49-50-801.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*

0520-7-2-.06 CATEGORY V: ACKNOWLEDGED FOR OPERATION.

(1) Schools in this category are those which are not category I, II, III or IV schools. Schools in this category shall not include home schools.

(2) Each school seeking acknowledgment for operation shall furnish to the State Department of Education the following information by November 1st of each year:

(a) Name, mailing address and telephone number of the school;

(b) Name and academic credentials of the principal or headmaster of the school;

(c) Number of students in each grade level as of October 1 of current school year;

(d) Name and academic credentials of each teacher and the subjects taught by that teacher;

(e) Certification that the school year provides an operating schedule that includes the minimum number of instructional days and hours as required of public schools. See Chapter 0520-1-3.

(3) Each school shall keep on file the curriculum offered and shall make copies available for inspection by the State Department of Education and the public upon request.

(4) Each school shall have facilities and fixed equipment which conform to the safety and health requirements of city, county, or state agencies.

(5) Each school shall comply with all rules and regulations and codes of the city, county, and state regarding planning of new buildings, alterations and safety.

(6) Each school shall comply with all rules and regulations of the Tennessee Department of Health regarding construction, maintenance and operation of the school plant.

(7) Each school shall observe all fire safety regulations and procedures promulgated by the Tennessee Fire Marshal's Office.

(8) Each school shall comply with the requirement of T.C.A. 49-6-5001 that each child in the school be vaccinated against disease.

(9) Each school shall comply with the requirement of T.C.A. 49-6-3007 that the names, ages, and addresses of all pupils in attendance be reported to the public school system in which the school is located.

(10) Each teacher shall possess at least baccalaureate degree, of which no more than twenty-five percent of course hours shall have been taken through home study or correspondence.

(11) Each school shall administer a nationally standardized achievement test covering the basic academic areas of grades 2 through 8 and grade 10. Results of the test shall be used to improve the instruction of the students.

Authority: *T.C.A. §§ 49-1-302.* ***Administrative History:*** *(For history prior to June 1987, see pages ii-iii). New rule filed April 24, 1987; effective June 8, 1987. Repealed and new rule filed March 16, 1992; effective June 29, 1992.*